IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 6.12.2004

CORAM:

THE HONOURABLE MR.JUSTICE M.KARPAGAVINAYAGAM
AND
THE HONOURABLE MR.JUSTICE C.NAGAPPAN

H.C.P.No.1058 of 2004

A.Thirumalvalavan .. Petitioner

vs.

1. The Government of Tamil Nadu,
Rep. by its Secretary,
Department of Prohibition & Excise,
Fort St.George, Chennai.

2. The District Magistrate and District Collector,
Cuddalore & District.

3. The Superintendent of Central Prison, Chennai.
.. Respondents

Habeas Corpus Petition filed under Article 226 of the Constitution of India, praying for issuance of a writ of habeas corpus, to call for the records of the detention order C.3/D.O.104/2004, dated 16.8.2004 passed by the second respondent and quash the same and consequently to produce the detenu Elango Nambi @ Elango @ Siva @ Sivakumar, S/o Ambalavanan Pillai, aged 34, before this Court and set his liberty forthwith.

For petitioner: Mr.R.Sankarasubbu for M/s.P.Vijendran

For respondents : Mr.E.Raja, Addl.P.P.

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ORDER

M.KARPAGAVINAYAGAM,J.

The question posed before this Court for consideration in this habeas corpus petition is as to whether it is necessary to assert on the part of the detaining authority in the grounds of

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detention while passing the order of detention on the detenu that there is imminent possibility of filing the bail application and consequently, there is imminent possibility of the detenu coming out on bail.

2. A.Thirumalvalavan, the petitioner herein, who is the brother of the detenu - Elangonambi @ Elango @ Siva @ Sivakumar, has filed this habeas corpus petition seeking to set aside the order of detention dated 16.8.2004, branding the detenu as a Goonda.

3. According to learned counsel appearing for the petitioner, the detaining authority has merely mentioned in the grounds of detention that, "There is possibility of moving a bail and coming out on bail by filing a bail application in the Court. I am also aware that in similar cases accused are enlarged by the same Court or the superior Court after lapse of some time."; but the detaining authority did not refer to the fact that the imminent possibility of filing the bail application and the likelihood of the detenu being released on bail, which is the basic essential requirement for passing an order of detention and as such, this would make the detention order vitiated. In order to substantiate the said plea, learned counsel appearing for the petitioner has cited number of authorities.

4.We have also heard learned Additional Public Prosecutor who has cited number of decisions on the said aspect.

5. We have given our anxious consideration to the merits of the contentions urged by learned counsel for the parties and also gone through the records and citations.

6. Let us first refer to the relevant observations made in the various decisions rendered by the Supreme Court and this Court while dealing with the said aspect.

7. In the decision reported in 1964 S.C.R. 921 (Rameshwar Shaw vs. District Magistrate, Burdwan @ Anr), the Supreme Court would observe as follows:

> " .... if the authority is *bona fide* satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The antecedent history and the

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past conduct on which the order of detention would be based, would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his release is necessary. ....."

8. In the decision reported in 1986 (4) S.C.C. 416 (Binod Singh vs. District Magistrate), the Supreme Court would hold as follows:

"7. ..... If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order. A bald statement is merely an *ipse dixit* of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent. ....."

9. In 1992 S.C.C. (Cri.) 1 (Abdul Sathar Ibrahim Manik. vs. Union of India), the Supreme Court held as follows:

... In the counter affidavit, it is stated that the period of remand to the judicial custody was to expire the next day after the detention. Therefore there was every likelihood of his moving for bail and getting released on bail. These materials show that the detaining authority was not only aware that the detenu was in jail but also noted the circumstances on the basis of which he was satisfied that the detenu was likely to come out on bail and continue to indulge himself in the smuggling

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activities. It, therefore, cannot be said that there was no compelling reasons justifying the detention despite the fact that the detenu is already in custody. ..."

10. In the decision reported in 1994 Supp. (1) S.C.C. 597 (Rivadeneyta Ricardo Agustin vs. Govt. of Delhi), the Supreme Court held as under:

"8. The above statement merely speaks of a "possibility" of the detenu's release in case he moves the bail petition. It neither says that such release was likely or that it was imminent. Evidently, the statement falls short of the requirement enunciated by this Court in Kamarunnissa (1991 (1) S.C.C. 128 = 1991 S.C.C. (Cri) 88). Even in the return filed in this petition, the authority has not stated (in response to Ground 'B' of the writ petition) that there was material before him upon which he was satisfied that the petitioner was likely to be released or that such release was imminent.

...

9. ....

10. ...

11. In the circumstances, we must hold that the principle enunciated by this Court in Kamarunnissa vs. Union of India (1991 (1) S.C.C. 128 = 1991 S.C.C. (Cri) 88) squarely applies and the order is liable to be quashed. It is accordingly quashed."

11. In 1994 S.C.C. (Cri) 482 (Veeramani vs. State of T.N.), the Supreme Court held as follows:

"7. Learned counsel, however, submitted that by making a sweeping statement that the petitioner is likely to be released on bail, the detaining authority cannot pass a detention order and when there is no likelihood of his being released on bail from custody, the order of detention is illegal inasmuch as there is no proper application of mind. .....

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.....

8. But in the instant case what we have to mainly see is whether there was awareness in the mind of the detaining authority that the detenu is in custody and that he had reason to believe that he is likely to be released. The grounds do disclose that the detaining authority was aware that the detenu is in custody and it is further mentioned that he was also aware that bail is usually granted by the courts in such cases and it is further emphasised that there is 'imminent possibility' of the detenu coming out on bail.

....

Therefore it cannot be said that the detaining authority has not applied its mind to this aspect. ..."

12. In the decision reported in 1995 (1) L.W. (Crl) 149 (Vinayagam vs. The District Magistrate and Collector of N.A.Ambedkar Dist., Vellore & Another), the Division Bench of this Court would hold as follows:

"3. ..... In the Tamil grounds, all that the Detaining Authority has stated is that the detenu may file a bail application and if he came out on bail, he will indulge in future prejudicial activities. Nowhere, the detaining authority has stated that there was an imminent possibility of his being released on bail or there was such a likelihood, which would then allow the detenu to remain at large making it possible for him to indulge himself in future prejudicial activities. So long as that vital link is missing, on the law laid down by the Supreme Court in Rivadeneyta Ricardo Agustin vs. Govt. of Delhi (1994 S.C.C. (Cri) 354), the detenu is bound to succeed."

13. The Apex Court, in the decision reported in 2001 (1) S.C.C. 341 (Amritlal vs. Union Govt.) held as follows:

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"As held in Binod Singh case (1986 (4) S.C.C. 416), if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. In the present case the requirement that there was likelihood of the detenus being released on bail was, however, not available in the reasoning as provided by the officer concerned. The reasoning available is the "likelihood of his moving an application for bail" which is different from "likelihood to be released on bail". This reasoning is not sufficient compliance with the requirements as laid down. The available cogent material in this case was the likelihood of having a bail application moved in the matter but not obtaining a bail order. Therefore, the detention order is liable to be quashed."

14. In 2003 M.L.J. (Crl) 652, a Division Bench of this Court observed as follows:

9..... The counsel for the petitioner has not pointed out any judgment positively holding that the expression "imminent", is a must or mandatory. The said expression could not be substituted by any word or words "meaning that the "release on bail was likely" in the immediate future or at the earliest. Such a meaning should be conveyed in the detention order and it must be shown that the Detaining Authority before passing the order was satisfied about the need to pass the order.

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(paragraph 13 of the Kamarunnissa vs. Union of India (1991 (1) S.C.C. (Crl.) 88 is extracted in the decision)

10. ....

11. ...

12. The above extract will show that the usage of the word "imminent" is not absolutely essential. It would be sufficient even to state that the detenu was likely to be released on moving a petition for bail. ... ".

15. In a Division Bench decision of this Court reported in 2004 M.L.J. (Crl.) 739 (Mohammed Meeran, Chennai vs. State of Tamil Nadu), it is held as follows:

"8. Following the ratio of the aforesaid decision, (Binod Singh vs. District Magistrate, Dhanabad (1964 (4) S.C.C. 416), in our opinion, in the present case, the order of detention is required to be set aside on account of the fact that there has been non-application of mind by the detaining authority who has recited about the possibility of the detenu being enlarged on bail, but there is nothing to indicate that the detaining authority had considered about the possibility of the detenu being released on bail "imminently". "

16. Having regard to the various above citations on the point raised, we find it appropriate to set down the following gist of conclusions referred to above:

(i) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(ii) When such awareness is there, then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody.

(iii) If there is a possibility of the detenu being released and on being so released, he is likely to be indulge in prejudicial activity, then that would be one such compelling necessity to pass the detention order.

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(iv) If the authority is *bona fide* satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. (emphasis supplied). The antecedent history and the past conduct on which the order of detention would be based, would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his release is necessary.

(v) The reasonableness of the satisfaction of the detaining authority cannot be questioned in a Court of law for the reason that the satisfaction of the detaining authority is his subjective satisfaction; the adequacy of the material on which the said satisfaction purports to rest also cannot be examined in a Court of law.

(vi) There must be awareness of the facts necessitating preventive custody of a person for social defence. If a man is in custody, and there is no imminent possibility of his being released, the power of preventive detention should not be exercised.

(vii) If there are cogent materials for thinking that the detenu might be released, then these should have been made apparent.

(viii) The mere statement that the possibility of the detenu's release in case he moves a bail petition, would not satisfy the mandatory requirement. The detaining authority must assert that such release was likely or that it was imminent.

(ix) Similarly, the statement that "likelihood of the detenu moving application for bail necessitating for detention", would not be sufficient, since the same is different from the likelihood to be released on bail, which is the essential requirement to make the detaining authority to pass the order of detention.

(x) The usage of the word "imminent" is not absolutely essential. No decision would say that the expression "imminent" is a must or mandatory. In other words, the said word "imminent" could be substituted by any word or words meaning that "release on bail was likely" or "in the immediate future" or "at the earliest" Only when such a meaning is conveyed in the detention order, then there is a need for the detaining authority to pass the order of detention to arrive at the subjective satisfaction.

17. In the light of the above ratio laid down by the Supreme Court, we have to see whether the detention order in question contained the basic ingredient "imminent possibility of the detenu being released on bail".

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18. Let us quote the relevant statement as contained in paragraph 5 of the grounds of detention:

> "5. I am aware that Thiru.Elangonambi @ Elango @ Siva @ Sivakumar has been remanded to judicial custody upto 23.8.2004 and lodged at Special Prison, Poonamallee, Chennai-56 in connection with the ground case in Cr.No.372/2004 and Cr.No.329/2004. There is possibility of moving a bail and coming out on bail by filing bail application in the Court. I am also aware that in similar caes accused are enlarged by the same Court or the superior Court after lapse of some time. And if he comes out on bail, he will indulge in such further activities in future as well, which will be prejudicial to the maintenance of the public order."

19. Now, we have to see as to whether there is any statement by the detaining authority in the above passage indicating with reference to the imminent possibility of the detenu being released on bail, so as to be prevented by passing the detention order.

20. As indicated above, the detaining authority may use the word "imminent" or any word equivalent to the same. Let us see the Dictionary meaning of the word "imminent" so as to find out whether any other word equivalent to the word "imminent" has been used in the relevant passage of the grounds of detention.

21. The following are the equivalent words for the word "imminent" as found from various Dictionaries:

(i) about to happen;
(ii) likely to happen immediately;
(iii) likely to happen very soon.

22. A perusal of paragraph 5 of the grounds of detention extracted above would never convey the expression "imminent possibility of the detenu being released on bail" or "likelihood of the detenu coming out on bail" or "release on bail was likely" or "release on bail in the immediate future" or "release on bail at the earliest" indicating that the release would likely to happen very soon. It has been merely stated in paragraph 5 of the grounds of detention that "There is possibility of moving a bail and coming out on bail by filing bail application in the Court." Whether this is enough?

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Our answer would be emphatic "no".

23. The grounds of detention would indicate that the detenu was in remand from 26.7.2004 in respect of two cases, one in Crime No.372/2004 registered for the offences under Sections 294-B, 307, 506 (ii) IPC in respect of the occurrence that took place on 26.7.2004, and another in Crime No.329/2004 registered for the offences under Section 397 IPC and Sections 4 and 5 of the Explosive Substances Act in respect of the occurrence which took place on 12.7.2004. Admittedly, both these offences are serious offences. Upto 16.8.2004, the date of the order of detention, there was no bail application filed by the detenu.

24. In the light of these two factors, namely (i) the detenu was in remand in two cases registered for serious offences and (ii) no bail application was filed, the detaining authority must necessarily arrive at the subjective satisfaction that there is "imminent possibility of the detenu filing bail application in both these cases and there is likelihood of the detenu being released on bail, and consequently, the detention order becomes necessary". Admittedly, this is not reflected in the grounds of detention.

25. We are not for a moment inclined to observe that merely because there are two cases of serious offences, it would be difficult to get bail in those two cases. Similarly, merely because the applications for bail have not been filed in these cases in spite of the fact that 20 days have elapsed, we cannot hold that the detaining authority cannot pass the order of detention. But we must make it clear that in the light of the above fact situation, the detaining authority, all the more reason, shall assert in the grounds of detention that "there is imminent possibility of moving a bail application and the likelihood of the detenu being released on bail" on the basis of the materials from which the detaining authority would arrive at the subjective satisfaction.

26. We are conscious about the settled position of law that we cannot be called upon to go into the adequacy of the materials placed before the detaining authority to arrive at the subjective satisfaction that there was immediate or likelihood of the release of the detenu necessitating the detention order. But what we want to emphasise is that the subjective satisfaction arrived at by the detaining authority with regard to the imminent or likelihood of the detenu being released on bail, shall be expressed in clear terms in the grounds of detention. If the said expression with reference to the immediate release is apparently absent, then, it has to be held that non-application of mind on the part of the detaining

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authority, is quite apparent.

27. In the light of what is stated above, since there is no such expression in the grounds of detention, we are constrained to conclude that the detaining authority, in the instant case, has never reflected his application of mind and consequently, the impugned order of detention is liable to be quashed.

28. Accordingly, the impugned order of detention is quashed. The habeas corpus petition is allowed. The detenu is directed to be set at liberty forthwith, unless he is required in connection with any other case.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To
1. The Secretary to Government,
Department of Prohibition & Excise,
Fort St.George, Chennai.

2. The District Magistrate and District Collector,
Cuddalore & District.

3. The Superintendent of Central Prison, Chennai.

4. The Joint Secretary to Government,
Public (Law and Order),
Fort St.Goerge, Chennai-9.

5. The Public Prosecutor, High Court, Madras.
6. The Superintendent, Special Prison,
Poonamallee, Chennai-56

1 cc to Mr.P.Vijendran, Advocate SR.53368
jp (co)
dv

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